

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

MARY ANN LAZAR JEFFERSON,

Plaintiff-Appellant,

Vs.

Shelby Circuit No. 68639 T.D.
C.A. No. 02A01-0611-CV-00279

**JAMES B. TAYLOR, ANGELINE
G. TAYLOR and ORKIN PEST
CONTROL,**

Defendants-Appellees.

FILED

September 08, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

FROM THE CIRCUIT COURT OF SHELBY COUNTY
THE HONORABLE WYETH CHANDLER, JUDGE

Thomas D. Yeaglin of Memphis
For Plaintiff-Appellant

Michael E. Keeney and Michael G. McLaren;
Thomason, Hendrix, Harvey, Johnson & Mitchell of Memphis
For James Taylor and Angeline Taylor

Philip E. Mischke, Jonathan P. Lakey;
Wyatt, Tarrant & Combs of Memphis
For Defendant-Appellant, Orkin Pest Control

AFFIRMED

Opinion filed:

**W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.**

CONCUR:

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE

This case involves the alleged fraudulent concealment of a cause of action that, if shown, would warrant tolling of the applicable statute of limitations. Plaintiff Mary Ann Lazar Jefferson appeals the order of the trial court granting summary judgment to defendants James B. Taylor,

Angeline G. Taylor (now Woodmansee), and Orkin Pest Control Company.

In February 1988, Jefferson purchased a home from the Taylors located in the Central Gardens Historic District of Memphis. The real estate contract specifically provided that the sellers would have the property inspected by a licensed and bonded termite control company and that the sellers would “remedy and repair any insecurities in the visible foundation timbers caused by termites or other wood destroying insects.”

In 1982, shortly after the Taylors purchased the home and six years before the sale of the residence to Jefferson, the Taylors contracted with the third defendant, Orkin Pest Control Company, for insect control. Orkin treated the home for an infestation of powder post beetles, instituted preventive treatment for termites, and installed steel support jacks underneath the house to limit further structural damage caused by the beetles. At that time the Taylors entered into a lifetime renewable termite repair contract with Orkin. Under this contract, Orkin would conduct annual reinspections for termites and would provide treatment as necessary as long as the annual renewal fee was paid. Following the annual reinspection in 1985, additional support jacks were installed under the home. When the house was sold to Jefferson in 1988, Orkin was retained to inspect the home and provide a termite report pursuant to the contract of sale. This report correctly stated that there was no active termite infestation, but failed to mention any of the previous damage to the structure.

Jefferson filed suit against all defendants in March of 1995, some seven years after purchasing the home from the Taylors. Jefferson’s complaint alleges that the Taylors had breached the contract of sale, and were guilty of fraudulently concealing the old structural damage to the wooden supports of the home. Jefferson also complains that she is a third party beneficiary of the termite treatment and repair contract between Orkin and the Taylors and that Orkin’s refusal to repair the previous damage is a breach of that contract. In addition, Jefferson complains that despite the termite form’s disclaimer that the report was “not a structural damage report,” the failure by Orkin to note existing damage constituted fraud, or at least negligence, because the form contained a blank to be used by the termite inspector to specify whether there was “visible evidence of previously treated infestation.”

All defendants filed motions for summary judgment on the ground that plaintiff’s cause of action is barred by the statute of limitations. They assert that since the gravamen of the

complaint is injury to real property, the action is barred by the three-year statute of limitations in T.C.A. § 28-3-105. They also argue that even if the action were treated as a breach of contract action governed by the six-year period in T.C.A. § 28-3-109, it would be barred.

The record reflects that plaintiff closed the transaction of purchase on March 21, 1988 and occupied the property shortly thereafter. The complaint was filed March 21, 1995.

The trial court granted the motions for summary judgment on the ground that there was no genuine issue of material fact on the issue of fraudulent concealment to warrant the tolling of the statute of limitations.

The plaintiff Jefferson appeals the judgments of the trial court and presents one issue for review: whether the trial court erred in granting summary judgment to the defendants. Jefferson asserts that there is sufficient evidence in the record to create an issue of fact for the jury as to whether any of the defendants fraudulently concealed the plaintiff's cause of action.

A trial court should grant a motion for summary judgment only if the movant demonstrates that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.03; *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1983); *Dunn v. Hackett*, 833 S.W.2d 78, 80 (Tenn. App. 1992). The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. *Byrd*, 847 S.W.2d at 210. On a motion for summary judgment, the court must consider the motion in the same manner as a motion for directed verdict made at the close of the plaintiff's proof; that is, "the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." *Id.* at 210-11. In *Byrd*, the Tennessee Supreme Court stated:

Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant trial. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth *specific facts* showing that there is a genuine issue of material fact for trial.

Id. at 211. (emphasis in original) (citations omitted). Where a genuine dispute exists as to any material fact or as to the conclusions to be drawn from those facts, a court must deny a motion for summary judgment. *Id.* (citing *Dunn*, 833 S.W.2d at 80).

The plaintiff emphasizes in her brief statements in Orkin's advertising literature that its

treatment of a home will create a “termite proof island,” however there is no evidence, or even an allegation, that there have been any live termites in the home since Orkin’s initial treatment in 1982. Indeed, the plaintiff admits that all damage at issue is “old.” This being the case, even if Jefferson were a third-party beneficiary of the termite contract, her only possible action against Orkin would be based on the preparation of the termite report.

The plaintiff Jefferson claims that Orkin’s failure to fill in the blank relating to visible evidence of previously treated infestation is evidence of fraudulent concealment of the previous damage. Jefferson contends in her brief that Orkin had a motive to falsify the termite report because it was still under contract with the defendants and would be liable for any termite damage that occurred after the lifetime renewable contract was entered into in 1982. However, even if this did amount to fraud, a crucial element of fraudulent concealment is lacking. The Tennessee Supreme Court has held that:

[A] plaintiff who seeks to toll a statute of limitations on the ground of fraudulent concealment must prove that the cause of action was known to and fraudulently concealed by the defendant. Knowledge on the part of the [defendant] of the facts giving rise to a cause of action is an essential element of fraudulent concealment. Concealment is also an essential element and it may consist of withholding information or making use of some device to mislead, thus involving act and intention.

Generally, a plaintiff seeking to establish fraudulent concealment must prove that the defendant took affirmative action to conceal the cause of action and that the plaintiff *could not have discovered the cause of action despite exercising reasonable diligence*.

Benton v. Snyder, 825 S.W.2d 409, 414 (Tenn. 1992) (emphasis added) (citations omitted). *See also Soldano v. Owens-Corning Fiberglass Corp.*, 696 S.W.2d 887 (Tenn. 1985) (stating that the statute of limitations begins to run at the time of the discovery of the fraud by the plaintiff if the plaintiff could not have discovered his cause of action despite exercising reasonable diligence); ***Harvey v. Martin***, 714 F.2d 650 (6th Cir. 1983). Although it can be argued that the allegedly incomplete termite report involved the withholding of information or was a device used to mislead the plaintiff, there is no evidence that any of the defendants took affirmative action that would prevent the plaintiff from looking in the basement of her own home during her over seven years of ownership. Indeed, the plaintiff herself states in her affidavit that “most of [the old termite damage], if not all of same can be visually seen by someone who is standing in my

basement area.” Plaintiff’s counsel, in questioning the Taylor’s credibility, thought that it was amazing that the Taylors had not inspected the repair work in the basement during their six years of ownership, but it apparently was not amazing to him that his own client had not visited her basement in over seven years. Though it may be true that the lighting was poor in the basement and that Jefferson rarely ventured there, these facts do not amount to fraudulent concealment on the part of any of the defendants.

With regard to the Taylors, the plaintiff relies on their failure to disclose the previous damage and the fact that someone had placed particle board over a portion of the damaged timber. Again, while this may be sufficient to raise an inference of attempted concealment, the plaintiff’s own statements indicate that the exercise of reasonable diligence, or even a cursory inspection of the basement area, would reveal the previous damage and certainly the metal support jacks used to prop up the wooden timbers.

In 1986, the Tennessee Supreme Court dealt with a factually similar case involving the reporting of termite damage in *Pietramale v. Dugay*, 714 S.W.2d 281 (Tenn. 1986). The *Pietramale* court held that the manner in which the defendant pest control company issued a termite letter relied upon by buyers created an issue of fact as to whether the company breached its duty to refrain from fraudulently or negligently issuing the certificate. This case is distinguishable from the case at bar because no statute of limitations issue was implicated. In seeking to toll the statute of limitations based on fraudulent concealment of a cause of action, the plaintiff’s exercise of reasonable diligence in discovering her cause of action is a controlling factor.

Since there is no evidence that the plaintiff could not have discovered her cause of action despite exercising reasonable diligence, the plaintiff has failed to make a showing of fraudulent concealment sufficient to survive the defendants’ motions for summary judgment.

For the foregoing reasons, the orders of the trial court granting summary judgment to all defendants are affirmed. Costs of the appeal are assessed against the appellant.

W. FRANK CRAWFORD
PRESIDING JUDGE, W.S.

CONCUR:

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE